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WILLS—THE RULES IN WILD'S AND SHELLEY'S CASES—In *Wild's Case*, it was resolved that "if A devises his lands to B and to his children or issue, and he hath not any issue at the time of the devise, the same is an estate tail; for the intent of the donor is manifest and certain that his children or issue should take, and as immediate devisees they cannot take because they are not *in rerum natura*, and by way of remainder they cannot take, for that was not his intent, for the gift is immediate, therefore, then, such words will be taken as words of limitation."[1] In a late Pennsylvania case,[2] under facts identical, the court held that the devisee took a life estate and that his children, if there should be any, would take the remainder in fee. Wild's Case dismissed such an interpretation with the remark that it was not the testator's intent. Both these courts, and all others, would admit, or, rather, would assert that the testator's intent was the pole star to guide them in navigating the difficult flood of testamentary language; with the same beacon before them, they arrive at antipodal harbors. The later decision would seem to be more logical and certainly more satisfactory. If the professed intent is to benefit the children surely the most effective way of doing it is by giving them the estate in remainder rather than by the doubtful expedient of giving their father a fee, especially where the contingent remainder can no longer be barred.

The above difference of opinion is one of construction, purely, and over questions of construction courts not infrequently are at odds. As to the question under discussion here, there seems to be an almost equal division. In England, the rule in Wild's Case is still the law.[3] In some American jurisdictions, it has been expressly applied in decision,[4] in others approved in *dictum*.[5] On the other hand, it has been flatly repudiated in a number of jurisdictions.[6] Frequently, it has been quoted without comment either way, but cases directly involving the application of the rule are not numerous.

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sons, either by bringing their minds and hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, by erecting or maintaining public buildings or works or otherwise lessening the burdens of government."

[1] 6 Co. Rep., 16 b. This rule is a *dictum*; the decision in the case was that a gift to A and after his decease to his children gave A a life estate only.

[2] Chambers v. Union Trust Co., 235 Pa. 610 (1912).

[3] Seale v. Barter, 2 B. & P. 485 (Eng., 1801); Broadhurst v. Morris, 2 B. & A. 1 (Eng., 1831).

[4] Nightengale v. Burrell, 15 Pick. 104 (Mass., 1833); Parkman v. Bowdoin, 1 Sumn. C. C. 359 (Fed., 1833); Vanzant v. Morris, 25 Ala. 285 (1854).

[5] Graham v. Flower, 13 S. & R. 439 (Pa., 1826); Cannon v. Barry, 59 Miss. 289 (1881); Chrystee v. Phyfe, 19 N. Y. 344 (1859);

[6] Carr v. Estell, 16 B. Monroe 309 (Ky., 1855); Faliso v. Currir, 55 N. H. 392 (1875); Jossey v. White, 28 Ga. 270, where the court says, in speaking of this rule: "With the reason of this or any other technical lore, connected with this branch of the law, I have nothing to do. Thank God, it no longer encumbers our statute book. Under our late act, it will soon be buried, with the numerous other follies and fossil remains of a bygone age;" but, see Butler v. Ralston, 69 Ga. 485 (1882) where the rule is applied.

That the rule is one of construction to ascertain the testamentary intention can be seen readily from its relation to the more general law. The word "children" when used in will or deed is presumptively a word of purchase, just as the words "heirs" or "heirs of the body" are presumptively words of limitation. Both presumptions are equally strong, but both can be rebutted, only, however, by definite and conclusive manifestations of a contrary intent.[7] The word "issue" is almost colorless; standing alone it is weakly presumptive of limitation, but it may be influenced either way by the proximity of the other words. The rule in Wild's Case s said to be an exception to the presumption arising from the word "children," but this appears to be a misstatement.[8] It is not an exception, it simply establishes facts sufficient to rebut the above presumption. Inasmuch as it is merely a rule of construction to arrive at the intent of the donor, it would seem that it too should be subject to rebuttal. In fact, in one English case, the court refused to apply the rule where, as the court saw it, there would result an over-riding of the testator's intent.[9]

Not until the donor's intent is ascertained is the more famous and more controverted rule in Shelley's Case[10] called into play. Then if it is found that the testator or grantor, in using the word "heir" or "issue" or "children," had in mind the sum total of those who might claim through the devisee, or grantee, named as an ancestor, and not a certain definite individual or class of individuals in existence at the termination of the first donee's life, the rule must be applied and the latter takes a fee tail or a fee simple. The rule supplements and puts into effect the intention as first ascertained by the court. It has nothing to do with determining the intent; it is simply an automatic rule of law relating to the tenure of land, and as such is arbitrary and irrebuttable.[11] In the United States, it has suffered from legislative displeasure and has either been expressly revoked or practically legislated out of existence by statutory rules to the effect that a gift to a man for life and after his death to his heirs, issue or children shall be taken to be a life estate followed by a remainder, in short, that these words shall always be interpreted as words of purchase when used in this manner. A gift to a man and his heirs will remain as it always was, a gift in fee. What of a gift to a man and his children? Will the old rule in Wild's Case apply to it and having been applied to resolve the intent, will the rule in Shelley's case apply to make it a fee? Clearly not in those jurisdictions where the latter has been

[7] Kent's Commentaries, p. 229; Washburn on Real Property, Vol. 2, p. 275; Rogers v. Rogers, 3 Wend. 503 (N. Y., 1829); Lessee of Findley v. Riddle, 3 Binney, 139, 148 (Pa., 1810); Doe v. Goff, 11 East, 668 (Eng., 1809); Guthrie's Appeal, 37 Pa. 9 (1860).

[8] Chrystie v. Phyfe, 19 N. Y. 344 (1859); and see the criticism in Cannar v. Barry, 59 Miss. 289 (1881).

[9] Buffar v. Bradford, 2 Atkyn 220 (1741).

[10] 1 Co. 93b, 104b (1579–1581).

[11] Perrin v. Blake, 1 W. Bl. 672 (1769); but see, Phillips, "The Rule in Shelley's Case." (London, 1805) p. 19.

revoked, but what of these other jurisdictions? Probably and properly, the courts would hold that this came within the spirit of the act so as to give the children a remainder in fee, as was held in the Pennsylvania case without the aid of a statute. In several, the rule remains unimpaired by statute and preserving much of its old vigor, although the courts seem reluctant to call it into action through misapprehension as to its real function.[12]

To return to the Pennsylvania case, it quotes the rule in Wild's Case and its alternative which is really a statement of earlier common law. It is: "Where a man devises land to A and his children or issue and he has issue of his body then his express intent may take effect, according to the rule of the common law, and no manifest and certain intent appears to the contrary, and therefore they shall have but a joint estate for life." Compare this with the first rule and it will be seen that it makes a world of difference whether or not there were children at the time of the devise. To a layman if not to a lawyer this variation in fact would hardly seem to warrant the wide difference in the conclusions. The words used in the original case were "at the time of the devise" which apparently means at the time of the execution of the will. Some courts take it to mean at the time the will takes effect, at the death of the testator.[13]

This second resolution or rule was used in early Pennsylvania cases, but they are practically overruled today and now a gift to a man and his children will give him a life estate with remainder to the children whether or not there were children at the time of the devise.[14] In the Pennsylvania case first alluded to, the court considered the question, under the facts there presented, as *res nova* and held in accord with cases under the second rule that the devisee took a life estate only. There are, however, earlier cases which by way of dictum, if not by actual decision, would seem to justify a contrary conclusion.[15]

Authorities are not united in respect to this second rule. England, apparently, accepts it along with the first.[16] Several American jurisdictions have applied it in decision or approved it in *dictum*.[17] Usually it is coupled with the first rule and both are stated to be the general law. But other jurisdictions have refused to apply it, and, as in Pennsylvania, have given the devisee named

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[12] Price v. Griffin, 150 N. C. 523 (1909); Bails v. Davis, 241 Ill. 536 (1909); Guthrie's Appeal, 37 Pa. 9 (1860).

[13] Jarman on Wills, Vol. 3, (5th Am. Ed.) p. 177.

[14] Rule 2 was applied in Graham v. Flowers, 13 S. & R. 439 (Pa., 1826), and in Shirlock v. Shirlock, 5 Pa. 367 (1847), and was repudiated in Hague v. Hague, 161 Pa. 643 (1894); Coussey v. Davis, 46 Pa. 25 (1863); and in Vaughn's Est., 230 Pa. 554 (1911).

[15] Seibert v. Wise, 70 Pa. 147 (1871); Cresslio's Est., 161 Pa. 424 (1894); Oyster v. Oyster, 191 Pa. 606 (1899).

[16] Webb v. Byng, 8 De G. M. & G. 633 (1856).

[17] Nightengale v. Burrell, 15 Peck. 104 (Mass., 1833); Allen v. Hoyt, 5 Metc. 325 (Mass., 1842); Buzzo v. McCarty, 86 Ind. 352 (1882); Dean v. Long, 122 Ill. 447 (1887); Utz Est., 43 Cal. 201 (1872); Wills v. Foltz, 62 W. Va. 262 (1907).

a life estate, remainder to the children as a class, to open and let in after-born children.[18] In one case, it was held that such words created a fee even though children were living.[19] It should be remembered that this latter rule likewise merely establishes a presumption and can be rebutted by evidence of a contrary intent of the testator as appears in the statement of it.[20]

J. S. B.

[18] Comsey v. Davis, 46 Pa. 25 (1863) and Pa. cases cited in Chambers v. Trust Co., 235 Pa. 610 (1912); Hatfield v. Sohier, 114 Mass. 48 (1873).
[19] Mosby v. Paul's Adm'r., 88 Va. 533 (1892).
[20] Jarman, Vol. 3, p. 179.